BOARD OF APPEALS CASE NO. 5012	*	**BEFORE THE**
APPLICANT: Andrew Sneddon	*	**ZONING HEARING EXAMINER**
REQUEST: Appeal of Administrative Decision regarding Spenceola Commercial Center; Spenceola Parkway & Rock Spring Road, Forest Hill	*	**OF HARFORD COUNTY**
HEARING DATES: May 1, June 1, June 29, and August 31, 2000	*	**Hearing Advertised** **Aegis: 3/15/00 & 3/22/00** **Record: 3/17/00 & 3/24/00**

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Andrew Sneddon, is a property owner who resides within sight distance of, and in the neighborhood adjacent to, the subject parcel or "project" known as Spenceola Commercial. In plain terms, it is the Applicant's contention that Spenceola Commercial meets the definition of an Integrated Community Shopping Center under the provisions of the Harford County Code and that the project should have been submitted to the Zoning Board of Appeals, and its accompanying public hearing process, for approval. The Applicant has filed this appeal, pursuant to Section 267-7E of the Harford County Code, based upon what he claims is a decision or interpretation by the Zoning Administrator that Spenceola Commercial is not an Integrated Community Shopping Center (ICSC) and, therefore, is not subject to approval by the Board of Appeals. The Applicant also claims that the site plan for the Spenceola Commercial project violates Sections 267-4 and 267-25A(4) of the Harford County Code with regard to parking requirements, as well as Section 267-41D(5)(e) of the Code regarding buffers for non-tidal wetlands in a Natural Resources District. The Applicant originally claimed that the subject project violated the Code with regard to requirements for access as well; however, that claim was withdrawn at the time of hearing.

The subject property is located in the southeast quadrant of the intersection of Spenceola Parkway and Rock Spring Road (MD Route 24), Forest Hill, adjacent to the Spenceola Farms residential subdivision, in the Third Election District. The parcel is more specifically identified as Parcel No. 113, in Grid 3E, on Tax Map 40. The parcel is approximately 13.73 acres in size, all of which is zoned B2/Community Business District. The owner of the property is HG Bel Air Holdings, LLC, 11 East Chase Street, Baltimore.

Case No. 5012 - Andrew Sneddon

By way of background, the project in question was apparently submitted to the County Planning Department for preliminary plan approval in accord with the provisions of the Subdivision Regulations. The Applicant attended a meeting of the Development Advisory Committee (DAC) regarding the project and raised questions as to alleged non-compliance with the Harford County Zoning Code, in addition to claiming that the project actually constituted an Integrated Community Shopping Center (ICSC) which should have been subject to approval through the Zoning Board of Appeals process prior to any preliminary plan approval or review by DAC. These concerns were raised in a letter from the Applicant to the Department of Planning, dated November 3, 1999 and on two information request forms also submitted on that date. In a letter dated December 15, 1999, Mr. Joseph Kocy, Director of Planning and Zoning, responded to the Applicant indicating that all the requirements of the Code had been met by the property owner, effectively (though not literally) denying that the project constituted an ICSC which would require Board of Appeals application and approval. The Applicant then filed this appeal from that "decision" on January 3, 2000.

MOTION TO DISMISS

Prior to the start of hearing on the merits, a Motion to Dismiss was filed in the case by the Harford County Department of Law on behalf of the government of Harford County (hereafter, the "County"). The County filed its Motion to Dismiss based upon four arguments:

1) **Since the Spenceola Commercial project had submitted site plans which were approved as part of the preliminary plan approval process outlined in the Subdivision Regulations (and not pursuant to the Zoning Code), any decision or communication from the Director of Planning, Mr. Joseph Kocy, (who also serves as the Zoning Administrator) with regard to the preliminary plan approval is not appealable to the Zoning Board of Appeals;**

2) **The letter or inquiry which the Applicant sent to the Department of Planning and Zoning following the Development Advisory Committee (DAC) meeting on the project was not a request for an interpretation, and thus the response from Mr. Kocy did not constitute an interpretation or a decision which is appealable to the Zoning Board of Appeals.**

Rather, the County argues, the letter sent in response to the Applicant's request was "merely an answer by the Planning Director to a citizen inquiring as to a result of a meeting...". Even if the response could be considered a "decision", the County argues that the "decision" was not a final decision and thus is not subject to appeal.

3) The Applicant is not an aggrieved party and therefore has no standing to appeal; and,

4) A prior Board of Appeals case, No. 4628 (Application of John and Grace Hiter) determined that a preliminary plan approval was neither an administrative decision nor an interpretation of the Zoning Administrator that was appealable to the Board of Appeals and the Hiter decision is controlling on this issue.

On the day of the hearing on the Motion, counsel for the property owner submitted a letter to the Hearing Examiner indicating that, as a party to the matter, the property owner intended to participate in the action and noted, "...for the record, that HG Bel Air [Holdings LLC] supports and is in agreement with the Motion to Dismiss this action filed by Harford County, Maryland." At hearing, counsel for the property owner sought to join in the Motion and file its own brief utilizing the same arguments made by the County, which request was denied by the Hearing Examiner for the reasons outlined below.

The Applicant responded to the County's motion, contending that :

1) Mr. Sneddon has standing as an "aggrieved" person based upon his status as an adjoining property owner and the fact that the Zoning Administrator's refusal to refer the matter to the Board of Appeals for approval as an ISCS denies him the right to participate as a formal party in the approval process;

2) The letter from the Zoning Administrator/Director of Planning in response to the Applicant's request was, in fact, a decision or interpretation by the Zoning Administrator that the project was not an ICSC and did not violate the Zoning Code, an interpretation which is subject to appeal by the Board of Appeals in accord with Section 267-7E of the Code;

3) The Applicant's letter to the Department of Planning & Zoning did constitute a request for an interpretation from the Zoning Administrator, and the response from Mr. Kocy was such an interpretation of the Zoning Code, and a final decision, and thus is appealable to the Board; and

4) Harford County did not have standing to participate as a party in the case or to file the Motion to Dismiss.

Case No. 5012 - Andrew Sneddon

On the issue of standing, the Hearing Examiner finds that the Applicant does, indeed, have standing to file an appeal based upon the fact that he resides in close proximity to the subject parcel (in fact he is within site distance of the proposed project). He has demonstrated by his participation in these and other proceedings involving the project that he is an "interested" party entitled to administrative standing based upon Maryland law [See, Sugarloaf v Department of the Environment, 344 Md. 271 (1996)]. Mr. Sneddon is also a "person aggrieved" as defined in the Harford County Code and in the relevant case law based upon the fact that he will be affected by the proposed project and will be denied a right to testify at a public hearing regarding approval of the project if it is wrongly denied Board of Appeals review. Mr. Sneddon is claiming there are violations of the Zoning Code and that Mr. Kocy, as the Zoning Administrator, has erroneously interpreted the Code by determining that the subject project is not an ICSC requiring Board of Appeals approval. It is this decision that Mr. Sneddon has appealed to the Board of Appeals. An appeal based upon the application of the Subdivision Regulations is appealable to the courts, but an appeal based upon an interpretation of the Zoning Code is appealable to the Board. Had Mr. Sneddon appealed the alleged violations of the Zoning Code directly to the courts, as the County suggests he should, that appeal likely would have been denied based upon a failure to exhaust his administrative remedies, namely the appeal to the Board.

The County government, through its Department of Law, however, does not have standing to file the Motion to Dismiss. The County is not a "person aggrieved" in this matter [See, Maryland National Capital Park & Planning Commission v Montgomery County, 267 Md. 82 (1972); Howard County v Mangione, 47 Md. App. 350 (1980)], and there is no statutory or other authority in either the Harford County Code, the County Charter, or the Zoning Board of Appeals Rules of Procedure which grants standing to the County in Board of Appeals cases. A review of the case law supports the previous decision issued by the Hearing Examiner in Case No. 4834, Appeal of Stephen E. Quick, in which the County had filed a similar motion to dismiss and it was determined that the County did not have standing to file such a motion.

As the Hearing Examiner noted:

> **"Well, I read the cases that were cited in your brief and I did independent research on the issue myself and, frankly, with all due respect to the County, I cannot find that the County has standing in this case.**
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> **I certainly do believe that the County Law Department can provide counsel to the Department of Planning and Zoning representatives during these hearings, during any one of them; but to actively participate in the process as an aggrieved party, I think, goes way beyond what the Harford County Zoning Code and Maryland law had in mind.**
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> **For that reason, I am going to deny the County standing as a party in the case."**

In The Matter Of Appeal of Stephen E. Quick, Case Number 4834, Hearing Date of March 15, 1999, Transcript, p. 11.

As the Hearing Examiner noted in Quick, the Department of Planning and Zoning is not a party in zoning cases. The Staff provides information and a recommendation based upon their expertise in the areas of planning and zoning. They administer the zoning laws. They give testimony just as experts for Applicants give testimony, but they are not parties, just as an expert is not a party. They do not have a right to appeal a decision or request final argument. Since the County does not have standing as a party in this matter, the Motion to Dismiss brought by the County is effectively moot.

Although the property owner did not file a timely or formal Motion to Dismiss, counsel did indicate a desire to join in such a Motion for the same reasons argued by the County in its Motion. For that reason, the Hearing Examiner will address the County's remaining arguments, and deny the Motion on further grounds.

The Applicant sent a letter to the Department of Planning and Zoning requesting that the Department address potential violations of the Zoning Code, including a claim that the property owner was attempting to circumvent the provisions of the Code by failing to apply for Board of Appeals approval as an Integrated Community Shopping Center.

In addition to specific alleged violations of the Zoning Code with regard to parking and NRD buffer requirements, Mr. Sneddon's letter states:

> **"...the [Spenceola Commercial Site] Plan as presented is only a hurried effort to pass through the Development Review Process a thinly veiled attempt at circumventing the requirements of an Integrated Community Shopping Center that must meet a higher performance and development standard as well as closer public scrutiny....**
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> **...We recommend that the Plan be properly altered to include the public crossroad and processed as an Integrated Community Shopping Center including input from the community it is supposed to serve. ...".**

Applicant's Exhibit No. 2, Department of Planning and Zoning Staff Report, Attachment 8.

The response from Mr. Kocy, (Applicant's Exhibit No. 1, Attachment to Application, and also Applicant's Exhibit No. 2, Staff Report, Attachment 7), although it did not address the issue in specific language, effectively functioned as a decision or interpretation of the Code, outlining specific reasons why the Code requirements for parking, grading, and buffers in the NRD had been met by the Applicant. In effect, the letter from the Department denied the Applicant's assertion that the project constituted an ICSC under the Code. At no point did Mr. Kocy's letter suggest that Mr. Sneddon's concerns were outside of the purview of the Zoning Administrator or irrelevant with regard to the provisions of the Code. To the contrary, Mr. Kocy stated that the preliminary/site plans were in compliance with the Code. The situation is no different than a scenario whereby a neighbor files a complaint of a zoning violation, the Planning Director investigates and sends a letter back saying that there is no violation of the Code. Section 267-7E provides that the aggrieved person has a right to appeal that "decision" of the Zoning Administrator to the Board of Appeals. Mr. Sneddon's letter to the Department was effectively a complaint that the proposed project violated the Zoning Code and Mr. Kocy's response was a decision that there was no violation. Pursuant to Section 267-7E, the Applicant is exercising his right to appeal that decision to the Board of Appeals.

At the hearing on the merits, evidence was presented to determine if there was any factual basis or validity to the Applicant's claims. The Department of Planning and Zoning, assisted by counsel from the Law Department, offered testimony in support of Mr. Kocy's determination. The property owner had standing to participate, testify and call witnesses in support of its position as a protestant in the matter and in support of its position that the project is not an ICSC and did not require Board of Appeals approval. All interested or aggrieved parties will have a right to appeal the decision of this Hearing Examiner, but to deny the Applicant the right to an appeal which is specifically granted under the Code would be an injustice and a violation of the very purpose of the Code, the County Charter and the Board of Appeals process itself.

Accordingly, the Motion to Dismiss was denied and the hearing proceeded on the merits.

HEARING ON THE MERITS

As a preliminary matter, prior to the start of the hearing on the merits, counsel for the primary Protestant, the property owner, requested that the Hearing Examiner recuse herself from the case based upon the appearance of bias. The Applicant opposed the request and the request was denied. The hearing went forward and was conducted on three additional evenings over the course of three months.

The first witness to testify was Jacquelyn Magness Seneschal, 509 Country Walk Court, Bel Air, who was qualified as an expert land use planner. Her resume was marked and admitted as "Applicant's Exhibit 4". Ms. Seneschal has been employed as a planner for over twenty years, including nine years as the Director of Planning in Charles County and five years of work as a planner and then Chief of Development Review in the Harford County Department of Planning and Zoning. She testified that she was actually involved in the drafting of numerous sections of the Harford County Zoning Code, including the "Definitions" and "Special Exception" sections. Ms. Seneschal indicated that she was retained to review the written materials in this matter, including the application, the site plans and the relevant regulations. As part of that review, she prepared a written report, with attachments, which was marked and admitted as "Applicant's Exhibit 5A-G".

Based upon her review, she reached the following conclusions, as set forth in her report:

1) **The Spenceola Commercial project meets the definition of a shopping center as specified in the Harford County Zoning Code and also meets the criteria for an ICSC (Integrated Community Shopping Center). Therefore, it is subject to the Special Development regulations and requires approval by the Board of Appeals;**
2) **The approved site plan violates the requirements of Section 267-41D(5)(e) of the Natural Resources District provisions of the Harford County Code in two areas; and,**
3) **The shared parking and use of driving aisles, as proposed by the owner, is permitted by the Code within approved shopping centers and is an integral component of the definition of an ICSC.**

Ms. Seneschal offered testimony regarding the history of the Code provisions regarding shopping centers and ICSC's, noting that these Code sections were added in an attempt to address issues of inconsistent application of standards for such projects. She noted that prior to the adoption of these provisions in the 1982 Zoning Code, shopping center projects were routinely "gerrymandered" by drawing lot lines in order to avoid going through the Board of Appeals public hearing process, and the definition was loose enough at that time to allow such maneuvering. According to Ms. Seneschal, outcomes were unpredictable, both for the developer and the community, and there were inconsistencies in the way one shopping center was treated in comparison to another similar project. Consequently, Ms. Seneschal explained that the Department of Planning and Zoning, for which she was employed at the time, drafted and persuaded the Council to pass new standards for shopping centers which were included in the "Special Development " provisions of the revised Zoning Code which was adopted in 1982. These included specific provisions and definitions for shopping centers and for Integrated Community Shopping Centers. It was Ms. Seneschal's testimony that while there have been some minor changes in the definitions regarding these projects since 1982, the majority of the provisions and the fundamental process has remained the same to this date.

Ms. Seneschal indicated that her analysis of the County's shopping center projects revealed that since 1982, when ICSC provisions began to be administered by the County, twenty (20) shopping centers designated as ICSC's have been approved. The average processing time through the hearing process is about eight and one half months, although this is reduced to 6.2 months if there is no appeal to the courts. The Spenceola Commercial project, which was not submitted for Board approval as an ICSC was granted site plan approval after approximately two months.

Ms. Seneschal testified that there are several elements set forth in the Code for what constitutes a shopping center, and she reviewed Board of Appeals cases to determine the criteria that have been utilized by the Hearing Examiners in prior cases. She indicated that there are four tests which are used as standards for defining a shopping center:

1. **Is the project a concentrated grouping of retail uses or retail and service uses?**
2. **Is the project designed, developed, and managed as an integral entity?**
3. **Does the project provide common vehicle access?**
4. **And does the project provide group parking?"**

Transcript, hereafter "T", p. 2-86.

Further testimony revealed that not all shopping centers are ICSC's. In order for a shopping center to qualify as an ICSC, at least one of three plus a fourth additional criteria must be met:

> **"It must have a minimum parcel size of three acres, or six business uses, or a gross floor area of at least 20,000 square feet; and it must be located in the B-1, B-2, or B-3 districts." (T, at 2-87).**

A shopping center on less than 3 acres, or with less than six business uses, or with less than 20,000 square feet will not qualify as an ICSC, even though it may be a shopping center under the Code. A shopping center that is not an ICSC does not require Board of Appeals approval if it is located in the business districts. However, according to Ms. Seneschal, if a shopping center does meet the criteria for an ICSC, it must have Board of Appeals approval in order to go forward under the Code. Ms. Seneschal further noted that shopping center projects with separate buildings or separate lots have been found to qualify as ICSC's and may have to be designed to meet the shared parking and other standards for ICSC's if they meet the definition under the Code.

In summary, Ms. Seneschal testified that, in her opinion, Spenceola Commercial is a shopping center based upon the definition of shopping center that is set forth in the Code. It is her contention that the project contains a concentrated grouping of retail and services uses. The site plan shows six buildings, with two of the buildings housing more than one tenant. The proposed project was designed and planned to be developed and managed as an integral entity, according to Ms. Seneschal. There is a unified architectural approach, a single landscaping plan, a lighting plan, and shared maintenance. There are shared parking areas, shared circulation drives, a shared storm water management facility, shared water and sewer facilities, and shared signage. Ms. Seneschal stated that many features of the project require common management. Even though the lots may be sold to or occupied by different businesses or individuals, the owners will have the continue to act together to attract and maintain customers. Further, according to Ms. Seneschal, the project has common vehicle access and group parking which are integral to how the project functions. In order for the shopping center to operate effectively, driving aisles must be shared in order to access all parking spaces and visually there is no distinction between the lots as to what parking spaces are assigned to which lot or use. Cross-easements and common access easements will be needed in order for customers to have effective access to the commercial establishments.

Ms. Seneschal went further in her opinion to state that, based upon her review of the materials, she has concluded that the project contains all the elements of an ICSC. This opinion is based upon the fact that the project is a shopping center which contains six or more retail uses, or six or more retail or service uses, it has a gross floor area of more than 20,000 square feet (over 117,000 square feet total) and it is located on over 3 acres (13.73 acres total). Lastly, it is located in a B2 zoning district. Therefore, according to Ms. Seneschal, Spenceola Commercial is a shopping center and one of the type of shopping centers that qualifies as an Integrated Community Shopping Center which must be approved under the Special Development regulations and approved by the Board of Appeals. It was Ms. Seneschal's opinion that the project developer "gerrymandered" the project by drawing lot lines in an attempt to avoid the Board of Appeals process (and the opportunity for public participation and input), the very practice that the current Code provisions were designed to eliminate.

Ms. Seneschal went on to testify that the site plan, as approved, violated the Code provisions for the Natural Resources District in that the plan shows a paved service road placed over a storm drain which is located within the 75 foot NRD buffer, as well as excess grading which intrudes into the NRD buffer to an extent greater than that allowed under the Code.

On cross-examination, Ms. Seneschal testified that the comparative list of shopping center approvals which she reviewed was not exhaustive, it contained only ICSC approvals, not basic shopping centers. She further distinguished several other specific shopping centers which have obtained approval without the ICSC requirements being imposed. It was Ms. Seneschal's position that part of what distinguished these other projects was the fact that they could operate independently in terms of access, parking, or other elements, while the subject project can only function on an interdependent basis.

Next to testify was the Applicant, Andrew Sneddon, 296 Tomato Court, Forest Hill. Mr. Sneddon has been a resident of the Spenceola Farms subdivision for approximately six years. He lives in the single-family home section of the community. His lot is located along the northern border of the subject commercial parcel. He indicated that he can look out his family room window or stand in his backyard and see the entirety of the subject parcel.

Mr. Sneddon testified that two years earlier, he and other community residents received a letter from the prior owner of the subject property, Dr. Streett, informing him that a request was being made to rezone the subject property from residential (R2) to commercial (B2). A meeting was arranged at the community clubhouse by Dr. Streett where he outlined the proposal for commercial rezoning and the residents were led to believe that they would have input into any proposed shopping center, as well as input into any variance requests which would be made with regard to the proposal. No formal drawings or plans were presented to the citizens at that time. The residents then consulted with Peoples' Counsel regarding the rezoning and they were advised about the differences between a shopping center and an Integrated Community Shopping Center, including the appeals process that would be available to the citizens if the project was expanded to something "beyond just the 'shopping center.'"

Case No. 5012 - Andrew Sneddon

Mr. Sneddon noted that the residents were very concerned about traffic and safety issues, as well as the impact a proposed shopping center might have on property values. At one point, the residents were presented with a proposed agreement from Dr. Streett and/or a co-owner of the property indicating that the residents would support approval of the project as an ICSC in exchange for the owners imposing certain development restrictions on the project. This proposed agreement was marked and admitted as "Applicant's Exhibit 11". The agreement was never signed or executed, according to Mr. Sneddon, because the residents never received sufficient information about the exact plans for the shopping center. The residents later learned that the owner had subdivided the parcel into smaller lots and was not going to submit the project for ICSC approval. It was Mr. Sneddon's testimony that he believed that this was done in an attempt to circumvent community input into the project.

Mr. Sneddon further testified that he attended the DAC meeting regarding plans for the project and at that meeting, the project was referred to by DAC members and others as a shopping center. Mr. Sneddon stated that he voiced his concern that the project was, in fact, an ICSC, but that representatives of the Department of Planning and Zoning simply skirted the issue. Mr. Sneddon never received a response from anyone at DAC regarding his concerns. He indicated that he also sent a formal letter, marked and admitted as an attachment to "Applicant's Exhibit 1", directly to the Department of Planning and Zoning. He received a response from Mr. Joseph Kocy, Director of Planning and Zoning, on December 15, 1999, marked and admitted as "Attachment 7 to Applicant's Exhibit 2", the Staff Report of the Department of Planning & Zoning. According to Mr. Sneddon, the response did not directly address his concerns regarding the ICSC issue.

On cross-examination, Mr. Sneddon acknowledged that the proposed agreement between the prior owner of the subject parcel and the residents of the Spenceola Farms homeowners' association regarding approval of the project as an ICSC was never signed and was thus not binding on either party. He also indicated that no variances were ever applied for, to his knowledge. He acknowledged that representatives of the residential community met with representatives of the current property owner/developer to voice their concerns about the site plan.

However, Mr. Sneddon stated that this was not the input that the residents had in mind when the ICSC was being discussed. He and the other residents wanted input "in front of some type of ruling body, commission, Hearing Examiner, and talking about the issue and our concerns so that some impartial third party could make a ruling as to what the developer needed to do with that shopping center." (Sneddon, T at 50).

Eight citizens testified in support of the Applicant's request. Mr. Tim Bailey, 309 Pond View Court, Spenceola Farms, in Forest Hill, testified that he believes that the subject project is an Integrated Community Shopping Center and should be submitted for approval as such in a process that allows for input by the community to address issues such as traffic safety in the neighborhood, crime prevention and maintaining property values. He indicated that he believed that the appropriate process, which allows for community input, was being avoided by trying to claim that the project is not an ICSC, when it meets all the requirements for an ICSC. The seven other witnesses essentially supported Mr. Bailey's testimony, and also added that they had significant and specific concerns regarding the project itself, including concerns about traffic safety, road access to the project, development into the NRD buffer zone, effects on the storm water management pond which serves the residential community, lighting from the commercial activity affecting nearby residents, and other issues which arise when commercial activity is located immediately adjacent to residential housing. Several of the citizens indicated that the questions and concerns which they raised at the DAC meeting were ignored or disregarded and that this further demonstrated a need for a public hearing as part of the Board of Appeals process.

Mr. Anthony McClune, Manager, Division of Land Use Management for the Department of Planning and Zoning, testified regarding the Department's recommendation that the Applicant's appeal to the Board be dismissed based upon the Department's position that the Applicant's letter to the Department was not a formal request for an interpretation from the Zoning Administrator under the Code and that the letter from Mr. Kocy was merely a response to the Applicant's inquiry, not an interpretation. Mr. McClune also testified that the Department does not believe that the project constitutes an ICSC. Rather, it is the Department's position that the Code allows shopping centers in the B2 District without Board of Appeals approval and it is the developer's choice whether to utilize the ICSC option for a particular project.

Case No. 5012 - Andrew Sneddon

In this case, according to Mr. McClune, the property owner decided to subdivide and planned the project so that each separate lot met the requirements of the permitted uses. He indicated that the creation of individual lots cannot be ignored, provided they meet the necessary requirements. It was Mr. McClune's testimony that the use of Special Development regulations, including ICSC projects, is an option for developers, not a requirement. In this project, Mr. McClune stated that some of the lots have shopping centers on them and some do not, but that none of the centers constitutes an ICSC. In addition, the number of parking spaces on each lot meets the Code requirements, and because of the subdivision of the lots, ICSC designation is not necessary.

Mr. McClune went on to explain how the other commercial developments reviewed by Ms. Seneschal were distinguishable from the subject project. Mr. McClune disagreed with the testimony of Ms. Seneschal regarding the physical separation of parking areas and the use of shared access and common drives. It was Mr. McClune's opinion that there is no requirement in the Code that mandates the ICSC designation if a commercial property utilizes shared access and common drives or curbing between parking spaces and lots. Further, Mr. McClune testified that the proposed project meets the Code requirements for parking and for the NRD buffer. He noted that the Code allows disturbance of the NRD buffer for utilities and for an essential access drive. The site plan calls for a service drive, which Mr. McClune stated is "essential" under the Code and therefore will meet the requirements of the NRD.

On cross-examination, Mr. McClune acknowledged that the Spenceola Commercial plan contains at least two lots which do not have their own access to a public street, unlike several of the other projects cited in comparison by both Ms. Seneschal and Mr. McClune. However, it was Mr. McClune's position, that with the use of cross easements, the lots could achieve such access and be approved independently. Mr. McClune further stated that there had been discussions with the representatives of the property owner about requesting an ICSC, but that the Department never recommended that the owner subdivide the lots to avoid the ICSC approval process. Mr. McClune noted that if the project had been submitted as an ICSC, it would have had to go through the Board of Appeals approval and the public hearing process.

Mr. McClune did recall possibly being advised that the property owner needed approval of the site plan before the end of 1999, although the witness stated that many applicants desire approval as soon as possible. Mr. McClune believed he may have been told that approval before the end of the year was important because it was necessary in order for the property to be sold to the current property owner. He acknowledged that if the project had been submitted for ICSC approval in October of 1999 (the date that the site plan was submitted), it would have been impossible to obtain approval for the project prior to the end of the year. Mr. McClune testified that the site plan and preliminary approval was granted for the project on December 8, 1999, 64 days after it was first submitted, and he indicated that the average time to approve plans is now 44 days. Mr. McClune acknowledged that he had received a letter from the Applicant's attorney, Mr. Lynch the day before the site plans were approved which again raised the issue of ICSC approval and other alleged Code violations (marked and admitted as "Applicant's Exhibit 5E"), but he stated that there was no reason to delay site plan approval on the basis of Mr. Lynch's or the Applicant's letters.

On further cross-examination, Mr. McClune testified that he is not aware of any provision in the Code that states that an ICSC project cannot be subdivided. He also suggested that there was no requirement in the Code that a developer follow one particular alternative, i.e. the ICSC versus a basic shopping center on subdivided lots. It is up to the property owner, according to Mr. McClune, to propose an ICSC, which would then be subject to the Board of Appeals process. He acknowledged that there is more opportunity for community input in the Board of Appeals process than that afforded under DAC review. He further acknowledged that the Department of Planning and Zoning never sent the Spenceola Commercial project to the Board of Appeals for approval. He indicated it was common to locate roads in the NRD buffer, if they are essential.

Case No. 5012 - Andrew Sneddon

Mr. Paul Muddiman, a vice-president with the engineering firm of Morris & Ritchie Associates, Bel Air and the engineer on the subject project, was qualified and testified as an expert in site design and the Harford County development process on behalf of the Protestant and subject property owner, H.G. Bel Air Holdings LLC. Mr. Muddiman's expert qualifications were outlined on his resume, marked and admitted as "Protestant's Exhibit 3". Mr. Muddiman indicated that he has been involved in taking hundreds of projects through the development process in Harford County, including many shopping centers and Integrated Community Shopping Centers, including those designated as Woodbridge Shopping Center, Riverside, Shopping Center, Constant Friendship Shopping Center, and Klein's Tower Plaza Center. According to Mr. Muddiman, the Spenceola Commercial project at issue here is not an ICSC, primarily because each lot must be looked at individually. Mr. Muddiman indicated that the subject project is a commercial development that the owner is proposing to subdivide. Each lot is looked at independently, with the requirements reviewed as to each separate lot. According to Mr. Muddiman, "You can't ignore the lot lines." (Muddiman, T., at 4-13). It was Mr. Muddiman's opinion that the Spenceola Commercial project actually consists of three shopping centers, with one each on lots 1, 2, and 3. Mr. Muddiman offered extensive testimony in support of this opinion, specifically comparing the subject project with other shopping centers which were approved around the county without being classified as ICSC's, even though they would have met the definition of ICSC if the lots had not been subdivided. He indicated that it was his opinion that the Amyclae Business Center contains two shopping centers and is not an ICSC despite the fact that the lot lines bisect parking spaces and the buildings have a common architectural theme. He indicated that he believed that Amyclae was similar to the Spenceola Commercial project and was not required to be approved as an ICSC. He referred to site plans for various other commercial projects which he compared to the subject project, and these plans were marked and admitted as "Protestants' Exhibits 5 - 8".

Case No. 5012 - Andrew Sneddon

Mr. Muddiman offered additional testimony regarding the Applicant's contention that the proposed project violates the Zoning Code with regard to NRD buffer and parking requirements. Mr. Muddiman noted that the Code allows development into the NRD buffer for placement of utilities as long as the area is stabilized and reseeded following placement of the utility. Further, Mr. Muddiman testified that the Code also allows "necessary access roads" to traverse the NRD buffer. He indicated that hundreds of roads similar to the service road shown on the subject site plan have been approved in the county despite the fact that they traverse an NRD buffer area. "Protestants' Exhibits 9 - 12" were admitted to show such roads approved on similar projects. In addition, Mr. Muddiman opined that the Spenceola Commercial project meets all parking requirements under the Code. He indicated that a licensed engineer had reviewed the Spenceola plan and found it to be in compliance with the Code with regard to parking and buffer requirements under the Code.

On cross-examination, Mr. Muddiman testified that he believes that the proposed service drive which traverses the NRD buffer is an "essential access road" as defined in the Code and therefore it is in compliance with the Code's provisions. However, Mr. Muddiman went on to state that the roadway did not meet the Code definition for "access". He also noted that alternative plans for the project were submitted concerning the impact of the roadway and the utility on the NRD buffer and that such plans should be contained with the Department of Planning and Zoning's files. Mr. Muddiman also testified that he had had discussions with the property owner about developing the project as an ICSC and had even prepared site plans for an ICSC on the site. Further, it was Mr. Muddiman's testimony that his client elected not to pursue the ICSC alternative, and instead chose to subdivide the parcel. While he indicated that he believed that the existence of lot lines are critical to a determination of whether a project fits within the definition of an ICSC, he also noted that there is nothing in the definition of an ICSC which refers to the existence or consideration of lot lines.

Mr. Muddiman further noted that an ICSC project does not allow for as much flexibility in developing a project, in that a developer couldn't sell off lots, or have tax and water and sewer bills separated by building, as they could be if a parcel is subdivided. On the other hand, he indicated that an ICSC does allow for increased building coverage of the parcel, from 30 to 40 percent, and that fewer parking spaces are required, and there are standard setbacks for the whole project, rather than separate setbacks for each building on separate lots.

In sum, Mr. Muddiman testified that pursuing a project under the ICSC designation is the developer's choice, with advantages and disadvantages applicable to either alternative. He did agree, however, that ICSC projects require Board of Appeals approval, with its attendant citizen participation and formal public input in the hearing process.

Ms. Seneschal was called back to testify in rebuttal and stated that she disagreed with both Mr. McClune's and Mr. Muddiman's contentions that the Spenceola Commercial project is not an ICSC because you must look at the lot lines and consider each lot separately. According to Ms. Seneschal, neither the definition of shopping center nor the definition of ICSC contains any reference to whether or not the project is divided into separate lots. She believed that the witnesses' analyses were flawed because they began with a presumption that you do not look at a project as a whole, that you ignore the whole picture. Ms. Seneschal indicated that Harford County historically has required public approval and public review of shopping center projects and that the ICSC regulations were intended to identify projects that have a larger impact on a community, requiring community input on issues such as traffic impacts, market analysis, and the like. Ms. Seneschal also indicated that, in her opinion, the Department of Planning and Zoning did not conduct a thorough review of this project based upon the fact that many issues were raised by the Applicant, citizens, and the Applicant's attorney prior to preliminary plan approval, including whether or not it constituted an ICSC, and none of those issues appear to have been addressed by the Department. Ms. Seneschal also disagreed with testimony that suggested that designation as an ICSC was a developer's option, as opposed to a requirement under the Code. According to Ms. Seneschal, the Code refers to shopping centers with certain characteristics which "shall" be developed as ICSC's. This wording, Ms. Seneschal opined, renders such a designation mandatory if the specified conditions are present.

CONCLUSION:

The Applicant has filed this appeal, pursuant to Section 267-7(E) of the Harford County Code, to three "decisions" made by the Zoning Administrator with regard to the Spenceola Commercial project, namely that:

1) **the project does not meet the definition of an Integrated Community Shopping Center which would require approval by the Zoning Board of Appeals;**
2) **the grading, as proposed for the project, does not violate Section 267-41D(5)(e) of the Natural Resources District provisions of the Code; and,**
3) **the proposed parking for the project does not violate Sections 267-4 and 267-25A(4) of the Code.**

One additional alleged violation of the Code regarding access was withdrawn at the start of hearing on the case. The Applicant contends that the proposed project does constitute an Integrated Community Shopping Center (ICSC), and that the project violates the Code with regard to parking and grading in the NRD as noted above.

In order to make a determination as to whether the proposed Spenceola Commercial Center project necessarily constitutes an Integrated Community Shopping Center, numerous sections of the Code must be reviewed. Section 267-4 of the Code defines "shopping centers" and "integrated community shopping centers" as follows:

> **"SHOPPING CENTER -- A concentrated grouping of retail uses or retail and services uses designed, developed and managed as an integral entity, providing common vehicle access and group parking.**
>
> **SHOPPING CENTER, INTEGRATED COMMUNITY -- A shopping center which contains:**
>
> **A. Six (6) or more retail uses;**
>
> **B. Six (6) or more retail and service uses; or**
>
> **C. A gross floor area of more than twenty thousand (20,000) square feet."**

Case No. 5012 - Andrew Sneddon

Section 267-39C(3) allows shopping centers as a permitted use in the B2 Community Business District and also provides as follows:

> **"Specific regulations. The following uses are permitted in each business district, subject to the additional requirements below:**
>
> **(3) Shopping center, provided that it contains fewer than six (6) business uses and the gross floor area is less than twenty thousand (20,000) square feet. Shopping centers on parcels of three (3) acres or more in excess of any of the above-noted provisions shall be developed as an integrated community shopping center (ICSC) in accordance with § 267-47." (Emphasis added)**

If a project meets the definition of an ICSC as set forth in the Code, then the provisions of Section 267-43B mandate that:

> **"Board approval. The following special developments shall be subject to approval of the Board pursuant to this section and § 267-9, Board of Appeals:**
>
> **...(3) The location on a parcel or portion thereof for an integrated community shopping center. The development plans for integrated community shopping centers shall be approved by the Zoning Administrator in accordance with this Article."...**

Further, Section D provides:

> **"Prior to approval of the location of an integrated community shopping center, the Zoning Administrator shall prepare a report regarding the project's compliance with the standards in § 267-9I, Limitations, guides and standards. To provide adequate information for this report, the Zoning Administrator may require the submission of a concept plan for the site, a traffic impact study, a market feasibility study and other information as needed to determine project compliance. The Board shall consider the report of the Zoning Administrator and specific recommendations contained therein in its decision regarding the location of a shopping center."**

Case No. 5012 - Andrew Sneddon

It is clear from the evidence presented at hearing and from analysis of the language of the Code that the design of the Spenceola Commercial project, without lot lines, would meet the definition of an ICSC and would require approval of the Zoning Administrator and the Board of Appeals before it could be developed. It follows then, that the primary issue which must be addressed, is whether the property owner for the Spenceola Commercial project can remove the project from ICSC status by designating lot lines and subdividing the parcel into 6 individual lots, or whether the project must be considered as one integrated project under the provisions of the Harford County Code, thereby retaining its status as an ISCS. If subdividing does eliminate ICSC status, then submission to and approval of the project by the Board of Appeals is not necessary, provided that the development of each individual lot meets the requirements of the Code. Since neither the Code or the Subdivision Regulations specifically states whether an ICSC project can be located on adjacent lots, or if subdivision of a project removes a project from ICSC classification, some interpretation of the applicable statutes appears necessary.

Maryland Courts have set forth basic rules for statutory construction and interpretation. First, the plain language of the statute must be reviewed and words must be given their ordinary and natural meanings. See, Gardner v State, 344 Md. 642, 689 A.2d 610 (1997). If the plain meaning of the statute is clear and unambiguous, any judicial inquiry must stop and the Court must then carry out the true intent of the legislature. See, Phillips Electronics v Wright, 348 Md. 209, 703 A.2d 150 (1997); Frank v Baltimore County, 284 Md. 655, 399 A.2d 250 (1979); and Wesley Chapel Bluemount Ass'n v Baltimore County, 347 Md. 125, 699 A.2d 434 (1997).

As noted by the Court in Hunt v Montgomery County, 248 Md. 403, 237 A.2d 35 (1968):

> **"A statute is not made unclear or ambiguous because one side in a controversy, in order to obtain a desired result, gives its words a meaning they do not on their face appear to have. If the words of a statute, given their normal meaning, are plain and sensible the legislature will be presumed to have meant the meaning the words import."**

ID. at 114.

However, if the meaning of the statute is ambiguous or unclear, the Courts may look to the legislative history and the purpose behind the statutory framework to assist in determining the meaning of the words as written. Lewis v State, 348 Md. 648, 705 A.2d 1128 (1998); Haupt v State, 340 Md. 462, 667 A.2d 179, (1995). In making such a determination, one must avoid an interpretation or construction that leads to illogical or untenable results. See Greco v State, 347 Md. 423, 701 A.2d 419 (1997); Fraternal Order of Police v Mehrling, 343 Md. 155, 680 A.2d 1052 (1996). Further, as set forth in Mayor of Baltimore v Bruce, 46 Md App 704, 420 A.2d 1272 (1980),

> **"The rule of statutory construction is clear that in ascertaining the intention of a legislative body all parts of a statute must be read together and all parts are to be reconciled and harmonized if possible. All parts of the statute must be read together so that no part becomes superfluous." {Citations omitted}.**

Absent a clear intent to the contrary, a statute must be read so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory. Management Personnel Service, Inc. v Sandefur, 300 Md. 332, 478 A.2d 310 (1984).

A more extensive review of the Zoning Code and the Subdivision Regulations reveals that it is the Zoning Code that specifically addresses requirements of shopping centers and ICSC's. Section 4.01 of the Subdivision Regulations states that: "The Subdivision layout shall conform to the Master Plan of Harford County and the Zoning Ordinance [Code] of the County."

Viewing this Section, in light of Section 267-6 of the Code, which provides that: "A. The terms and provisions of this Part 1 shall be liberally construed to effectuate the general purposes of the Part 1 as set forth in § 267-3", and, further that "...(1) the particular shall control the general," it seems clear that the Subdivision Regulations were not intended to supersede the purpose or the requirements of the Code, unless so specifically stated. In fact, Section 267-6A(7) expressly states: "When a term is defined in the County Subdivision Regulations or in the County Building Code, EN as noted in this Part 1, it shall have the meanings specified in the Subdivision Regulations or Building Code unless specifically defined in this Part 1." (Emphasis added). The Subdivision Regulations do not define or include standards for shopping centers or ICSC's, therefore, we must look to the Code for guidance regarding such projects.

The purpose of the Zoning Code of Harford County is set forth in Section 267-3, which provides:

> **"A. The purpose of this Part 1 is to promote the health, safety, morals and general welfare of the community by regulating the height, number of stories, size of buildings and other structures, the percentage of lot that may be occupied, the size of lots, yards and other open spaces and the location and use of buildings, structures and land for business, industrial, residential and other purposes. This Part 1 is enacted to support the Master Plan and designed to control traffic congestion in public roads; to provide adequate light and air; to promote the conservation of natural resources, including the preservation of productive agricultural land; to facilitate the construction of housing of different types to meet the needs of the county's present and future residents; to prevent environmental pollution; to avoid undue concentration of population and congestion; to facilitate the adequate provision of transportation, water, sewerage, schools, recreation, parks and other public facilities; to give reasonable consideration, among other things, to the character of each district and its suitability for particular uses, with a view to conserving the value of buildings and encouraging the orderly development and the most appropriate use of land throughout the county; to secure safety from fire, panic and other danger; and to conserve the value of property.**

B. It is the policy of Harford County, Maryland, that the provisions of this Part 1 or any rule or regulation adopted to administer this Part 1 shall not be interpreted, implemented or intended in any manner so as to regulate, restrict, control, interfere with or govern the use of a person's home with respect to those uses commonly associated with the enjoyment of the home, including but not limited to the rights of parents to educate their children in their own home and the rights of persons to use their own home for religious activities. "

If the general purpose of the Code is "to promote the health, safety, morals and general welfare of the community" and, more specifically, to address issues of traffic congestion, conservation of natural resources, pollution prevention, adequate water, sewerage. and parks, among other concerns which directly affect the citizenry, including the conserving of property values, one must then conclude that it is part of the duties and responsibilities of the Zoning Administrator and the Board of Appeals charged with administration and enforcement of the Code, to interpret and decide cases under the Code with these issues and concerns at the forefront.

The argument that the Code provisions, including the Special Development Regulations regarding ICSC's, in the absence of specific statements to the contrary, are for the convenience or option of a project developer, is simply not reasonable or in accord with sound public policy. Permitting a project to be "gerrymandered" or subdivided, in order to avoid regulations which protect the public health and welfare, without specific language authorizing such activity, would not appear to be in accord with the intent of the legislative body or with the history and purpose of zoning laws and regulations.

Accordingly, the Hearing Examiner finds the following:

1. **The testimony of Applicant's expert planner, Ms. Seneschal, was undisputed as to the purpose behind the introduction and passage of the Code provisions which established the Integrated Community Shopping Center. Page 4 of Applicant's Exhibit No. 7 (Comprehensive Zoning Review Process Guide to the Proposed Zoning Code, Harford County Department of Planning and Zoning, March 1982) states that one of the flaws of the existing zoning ordinance was:**

> **"Insufficient standards, particularly for more intense commercial and residential development. Although the approval process makes it very difficult and expensive to initiate a Community Development Project (CDP), the absence of CDP standards in the present ordinance means that the public cannot be certain of any benefits on final approval. Every CDP is a subject for fresh negotiations resulting in haphazard, inconsistent, and, therefore, inequitable conditions being applied to projects. The commercial district regulations are sketchy and incomplete, altogether inadequate to the task of improving the appearance of our strip development and shopping centers. The language ambiguities encourage gerrymandering of projects to avoid the public review process...."**

Given the fact that Ms. Seneschal was actually employed by the Department during this time and was actually involved in the drafting of the proposed legislation, together with the fact that her testimony was uncontroverted on this point, the Hearing Examiner finds the purpose of the ICSC statute as outlined by Ms. Seneschal to be compelling. That purpose includes identifying projects that have a larger impact on a community, and which should demand community imput on issues such as traffic, safety, property values, and the like. The Spenceola Commercial project appears to be the type of project to which the statute was intended to apply. Allowing a project developer to "opt out" of ICSC status by drawing lot lines would render the Special Development regulations for ICSC's impotent and would defeat the very purposes for which they were designed.

2. **The "site plan" submitted by the prior property owner was submitted as one project, designated by the owner as Spenceola Commercial, showing a total acreage of 13.73 acres, comprised of six lots, with shared parking, shared access roads and service drives, shared driving aisles, and shared storm water management facilities.**
3. **The site plan approval issued by the Department of Planning and Zoning and signed by the Department and the owner/developer refers to the site as Spenceola Commercial, referencing one plan number, on an area of 13.73 acres, with six lots and proposing the construction of six buildings. Requirements for the issuance of appropriate permits call for the submission of a single landscaping and lighting plan, the issuance of a single grading permit, as well as unified or single requirements for commercial access to roadways, storm water management and signage.**
4. **The site plan submitted by the owner meets the definition of a shopping center under the provisions of Section 267-4 of the Code. The plan calls for a "concentrated grouping of retail uses or retail and services uses (including a grocery store, a bank, several retail spaces, a fast food restaurant and a day care center) designed, developed and managed as an integral entity (as noted, the Center has unified architectural, landscaping and lighting plans, shared storm water management facilities, interior maintenance, and signage) providing common vehicle access and group parking (shared parking, drive aisles and vehicle access are proposed). Protestant's expert did not dispute the fact that the plan involved a shopping center, although he opined that there were three shopping centers proposed, one on each of three of the lots. The Hearing Examiner finds that, taken as a whole, the proposal constitutes one shopping center project.**
5. **The language of the above section mandates that a shopping center on more than 3 acres, with more than six business uses or with a gross floor area of more than 20,000 square feet must be submitted to the Board of Appeals for approval as an Integrated Community Shopping Center.**

6. **The subject project is a shopping center on 13.73 acres. The proposal calls for more than six retail and services uses as well as a gross floor area of more than 117,000 square feet. The project is located in the B2 district. Based upon these findings, the project does meet the definition of an Integrated Community Shopping Center under the provisions of the Harford County Code and it is subject to review and approval by the Board of Appeals.**

Given the fact that the project has been determined to be an ICSC, a revised plan in accord with the Code provisions for such projects must be submitted to the Zoning Administrator and to the Board of Appeals for review and approval. The Applicant's claims regarding alleged violations of the Code with regard to parking and grading may not apply to the new ICSC plan and, therefore, they are not ripe for consideration by the Hearing Examiner at this time.

Therefore, based upon the findings of fact and law as outlined above, it is the determination of the Hearing Examiner that the Spenceola Commercial project, as proposed in the site plan submitted by the owner constitutes an Integrated Community Shopping Center under the provisions of the Harford County Zoning Code and must be submitted to the Board of Appeals for review and approval.

Date JANUARY 23, 2001

Valerie H. Twanmoh
Zoning Hearing Examiner